United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1319

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RICHARD THOMSON FORD,
a/k/a VINCENT A. THOMAS,
a/k/a JOHN A. AUGUST,

Defendant-Appellant.

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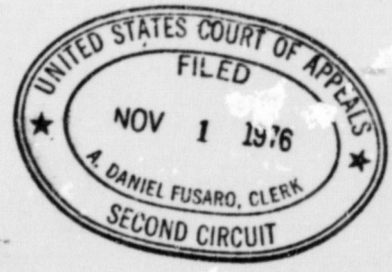
Docket No. 76-1319

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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BECAUSE THE GOVERNMENT VIOLATED ARTICLE IV(c) AND IV(e) OF THE INTERSTATE AGREEMENT ON DETAINERS, THE INDICTMENT MUST BE DISMISSED.

A. Appellant's transfer to federal custody was pursuant to the Interstate Agreement on Detainers.

The Government argues, in its brief, that appellant's transfer under a writ of habeas corpus ad prosequendum was not a request for temporary custody under the Interstate

Agreement on Detainers. This position, which the Government recognized was contrary to the interpretation of the Agreement reached by Judge Bartels in United States v. Mauro, 414 F. Supp. 358 (E.D.N.Y. 1976), is now foreclosed by the affirmance of Mauro by this Court. United States v. Mauro, Doc. Nos. 76-1251, 76-1252, slip op. 265 (2d Cir., October 26, 1976). Accordingly, the Interstate Agreement is fully applicable in this case.

The Government does not contest the fact that if the Agreement on Detainers applies, it was violated in this case. In fact, as noted in appellant's main brief, the Government violated two provisions of Article IV of the Agreement. Thus, appellant was brought to federal custody and transferred back to Massachusetts before standing trial, in violation of Article IV(e) of the Agreement. Moreover, the proceedings in this case also violated Article IV(c), which requires that "trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."* At least two of the continuances in this case (August 21, 1974, to November 18, 1974; June 11, 1975, to September 2, 1975) were undisputably granted

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*See 18 U.S.C.A. (Appendix); appellant's main brief at 16-17 and n.16.

without proceedings in open court. Thus, even if the continuances were held to be reasonable, a position we dispute, the Agreement was violated in any event.

B. The Government's violation of the Interstate Agreement on Detainers may be raised for the first time on appeal.

The Government argues that appellant's failure to raise his Interstate Agreement on Detainers claim before trial is an absolute bar to raising the claim on appeal. We respectfully submit that this position does not withstand analysis.

First, as the Government concedes, Article IV(e) of the Agreement on Detainers, by its own terms, does not require any pretrial defense motion, but rather mandates that when the Agreement is violated, the indictment "shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." (Emphasis supplied.) Thus, the literal terms of the Agreement require that the court, sua sponte, order a dismissal whenever evidence of the alleged transfer appears, or in the alternative, when it is brought to the court's attention by a defense motion. The claim may be raised on appeal or noticed by the appellate court even if not raised below. See United States v. Ricketson, 498 F.2d 367, 372-373 (7th Cir.), cert. denied, 95 S.Ct. 227 (1974). Thus, in Ricketson, the Seventh Circuit, sua sponte, directed the parties on appeal to discuss the impact of Article IV of the Agreement, despite the fact that the issue had apparently never

previously been raised at trial or even by counsel on appeal. The unstated assumption in Ricketson, of course, is that this issue is not foreclosed by failure to raise it before trial. And the position in Ricketson is in accord not only with the terms of the Agreement, but with basic common sense. Surely if the drafters of the Agreement had wished to require a defense motion as a prerequisite to exercise of the rights under Article IV, it would have been a simple matter to have included such a provision. In short, the plain language of Article IV belies the Government's interpretation.

Similarly without merit is the Government's claim that Rule 12 of the Federal Rules of Criminal Procedure, which requires that certain defenses must either be raised prior to trial or be forfeited, mandates an affirmance. The simple problem with the Government's argument is, as even the Government recognizes (see Government Brief at 19), that appellant's claim is not covered by the Rule.

Under Rule 12(b), objections based on "defects in the institution of the prosecution" or "defects in the indictment or information" with the exception of jurisdictional objections, must be raised prior to trial. "Motions addressed to the pleadings under Rule 12 embrace defenses cognizable under the following rules: Rule 6 (grand jury), Rule 8 (form of indictment or information), Rule 8 (joinder), and Rule 18 (venue)." 8 J.Moore, Moore's FEDERAL PRACTICE, ¶12.02[1] (1976). None of these provisions is applicable here. Appellant does not

challenge a defect in the indictment, nor a defect, such as double jeopardy, in the institution of the proceedings. What he challenges is a defect, by violation of Article IV(c) and IV(e) of the Agreement, in the continuation of the prosecution following that violation. Rule 12 simply does not apply here. Like the related statutory and constitutional claims of speedy trial, the determination of the effect of failure to object is not reposed in Rule 12, but in the constitutional or statutory provisions creating the right. Compare Barker v. Wingo, 407 U.S. 514, 528 (1972) (defendant's failure to demand speedy trial doesn't waive claim) and Rule 48, Fed.R.Cr.Proc., with Rule 11(c), Southern District Plan for the Prompt Disposition of Criminal Cases (1976) (defense failure to move to dismiss is a waiver of that claim). While the Agreement could have provided that failure to move to dismiss the indictment prior to trial constituted a waiver, it does not so provide. The clear meaning of the statute requires that this Court consider appellant's claim raised on this appeal.

C. The fact that appellant expressed a wish to return to Massachusetts is not a waiver of his rights under the Interstate Agreement on Detainers.

On April 1, 1974, appellant appeared, without counsel, on the superseded indictment, and stated his wish to return to Massachusetts. The Government seizes upon this uncounseled statement as evidence that appellant knowingly waived his claims under the Interstate Agreement on Detainers.

However, in order for appellant's statements to have been effective as a waiver, they must have been an "intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); United States v. Mauro, supra, slip op. at 270, n.3. The record is totally barren of evidence that appellant was aware that he had a right to be tried before returning to confinement in Massachusetts, and at no time was he informed of such a right by the court. Without at least some indication that appellant was aware of the rights being waived, his statements, made without benefit of counsel, cannot be taken as a waiver of his claim. Thus, this case is identical to United States v. Mauro, supra. There, one of the defendants, prior to his arraignment and apparently in the presence of counsel, also requested to be transferred back to state custody. The court found the defendant's statements were not a waiver of his claims in the absence of evidence that he was relinquishing a "known right or privilege." Here, appellant's statements,

unlike those in Mauro, were not even made with benefit of counsel. There can be no waiver on this record.

The Government also seeks support from a letter, prepared by the Assistant U.S. Attorney, dated June 3, 1974, and submitted for the first time on this appeal (Government Appendix 1-a), indicating that it was the Government's opinion that it was returning appellant to state custody at defense counsel's request. Assuming, arguendo, that this letter which was de hors the record in the district court is properly included as an exhibit on appeal, it hardly suffices to show waiver. The letter contains no reference to a statement by appellant himself indicating he was aware of the rights he was waiving or a statement by his attorney indicating the circumstances underlying his supposed "request." We respectfully submit that this document, which is total hearsay as to appellant, is an insufficient basis to establish appellant's knowing and intelligent waiver.

Finally, we note that the Government's "waiver" argument pertains only to appellant's claim under Article IV(e). Appellant also alleges that Article IV(c), requiring the presence of defense counsel or the defendant before continuances may be approved, was violated by the granting of several continuances without court hearings. There is not a shred of evidence to indicate that appellant was waiving the protections provided under that section of the Agreement. Accordingly, even if this Court were to find a waiver of appellant's Article IV(e) claim, a position with which we vehemently disagree, the indict-

ment must still be dismissed for failure to follow Article IV(c) of the Interstate Agreement on Detainers.

CONCLUSION

For the foregoing reasons and the reasons argued in the main brief for appellant, the judgment of the District Court must be reversed and the indictment dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

November 1, 1976

I certify that a copy of this reply brief ~~and appendix~~ has been mailed to the United States Attorney for the Southern District of New York.

David J. Goldstein